

KIRK ALLEN NEWBY,)
)
Petitioner,)
)
v.) No. 4:10CV1168 RWS
)
UNITED STATES OF AMERICA,)
)
Respondent.)

This matter is before the Court on petitioner’s motion to proceed in forma pauperis and petition for writ of audita querela pursuant to 28 U.S.C. § 1651. The motion to proceed in forma pauperis will be granted. Because plaintiff will be allowed to proceed as a pauper, this action is subject to summary dismissal if it is “frivolous, malicious, or fails to state a claim upon which relief can be granted.” 28 U.S.C. § 1915(e). Having reviewed the petition, the Court finds that it should be summarily dismissed.

On October 22, 2007, petitioner entered a voluntary plea of guilty to Conspiracy with the Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, a Class A Felony, and Possession of Firearm During and in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1) and (2), likewise a Class A Felony. See *United States v. Newby*, 4:07CR392 RWS (E.D.

Mo.). Pursuant to 18 U.S.C. § 924(c)(1)(D)(ii) and United States v. Alaniz, 235 F.3d 386 (8th Cir. 2000),¹ the Court sentenced petitioner to consecutive sentences of ten years and fifteen years' imprisonment. Petitioner appealed, and the United States Court of Appeals for the Eighth Circuit found that the appeal "f[ell] within the scope of a valid appeal waiver that was contained in Newby's plea agreement" and dismissed the appeal. United States v. Newby, 08-1244 (8th Cir.) (Slip op. May 13, 2009).

Petitioner now brings this petition for writ of audita querela based on two cases from other circuits that disagree with the Eighth Circuit's decision in Alaniz.² Petitioner says that his sentence was correct at the time he was sentenced, but he argues that the cases which he cites now control and that he should be resentenced.

Petitioner is incorrect. Alaniz is the controlling law in this Circuit, and the cases to which petitioner cites have no legal effect on his sentence. As a result, the Court will dismiss petitioner's petition for writ of audita querela as frivolous.

Accordingly,

¹Interpreting 18 U.S.C. § 924(c) to "require[] a consecutive firearm sentence for a criminal defendant already subject to a greater minimum sentence for his predicate drug crime or crime of violence." Alaniz, 235 F.3d at 390.

²United States v. Whitley, 529 F.3d 150 (2nd Cir. 2008); United States v. Almany, 598 F.3d 238 (6th Cir. 2010).

IT IS HEREBY ORDERED that petitioner's motion to proceed in forma pauperis [Doc. #4] is **GRANTED**.

IT IS FURTHER ORDERED that petitioner's petition for writ of audita querela is **DISMISSED**.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 5th day of August, 2010.

A handwritten signature in black ink, appearing to read "Rodney W. Sippe", written over a horizontal line.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE